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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Under this Court's precedents, culminating in *Blum v. Yaretsky*, —— U.S. ——, 50 L.W. 4859 (June 25, 1982), is an action by a pension plan participant to invalidate a provision of the plan as violative of ERISA justiciable where the plan participant does not allege or show that he is or may be affected by the challenged provision and has never applied for or been denied benefits under the plan?

2.a) May a federal court award attorneys' fees to a plaintiff in a suit under ERISA based on all hours spent by his attorneys in litigating the action where the plaintiff prevailed on only one of five separate and distinct claims?

b) May a federal court of appeals affirm in full a district court's award of attorneys' fees where

1) the court of appeals has reversed three of the four liability determinations which the district court has made;

2) the district court had awarded a multiplier of 2 for all hours expended by the plaintiffs' attorneys in the litigation; and

3) the district court in fixing the award had placed reliance on the substantial assets of the defendant pension fund (while disregarding its substantial actuarial liabilities), and on the amount of attorneys' fees expended by the fund in matters unrelated to the litigation?*

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* The parties hereto are: William R. Janowski and Robert H. Barnhisel, individually and on behalf of all others similarly situated, plaintiffs-respondents.

International Brotherhood of Teamsters Local No. 710 Pension Fund and William D. Joyce, John D. Kelahan, Anthony Curcio, Robert J. Baker, John J. Barranco and Roy M. Pride, Trustees of the Fund, defendants-petitioners.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 673 F.2d 931. It is reproduced at pp. 1a-2a of the separately bound appendix to this petition (App.). The District Court wrote three opinions, none of which has been officially reported. The District Court's decision on class action is reproduced at App. 25a-28a; its decision on cross-motions for summary judgment is reproduced at App. 29a-36a, and its decision on attorneys' fees is reproduced at App. 40a-47a.

JURISDICTION

The decision of the Court of Appeals and its Order (App. 21a-22a) were issued on March 8, 1982. A timely petition for rehearing and rehearing en banc was filed on April 7, 1982 (App. 23a-29a). On July 7, 1982 Justice Stevens entered an Order extending the time for fil-

ing this petition to and including July 27, 1982 (App. 50a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides in pertinent part as follows:

> The Judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States * * *.

Section 502 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 88 Stat. 891, 29 U.S.C. § 1132, as amended 94 Stat. 1295 provides in pertinent part as follows:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> * * * *
>
> (g)(1) In any action under this title (* * *) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

A. The Complaint and the District Court's Class Action Decision

Petitioner, International Brotherhood of Teamsters, Local No. 710 Pension Fund ("the Fund" or "the Plan") is a jointly administered multiemployer defined benefit pension plan. The individual petitioners are the trustees of the Plan responsible for establishing its eligibility requirements and administering it. (The petitioners will sometimes be jointly referred to herein as "defendants".)

The individual respondents ("plaintiffs") are two participants in the Plan.

In this action plaintiffs challenge several amendments to the Plan, which had been adopted by the trustees in light of the enactment of ERISA, and which had been submitted to and approved by the Internal Revenue Service on September 26, 1977. (R. 15, pp. 2-3, 8-9, 11-13).[1] As the case presently stands, only one of the plaintiffs' challenges has been sustained—that the Plan does not properly credit part-time services. The present petition does not seek review of this ruling. Rather this petition is addressed 1) to the determination by the courts below that the plaintiffs' challenge to the legality of the part-time service credit rule is justiciable although neither made any showing that he was or could be affected thereby, and 2) to the award to plaintiffs of attorneys' fees of $142,485 which is excessive for several reasons, including that it was calculated on the basis of time spent by plaintiffs in litigating each of their claims although *defendants* prevailed on all but one.

The original complaint was filed on March 6, 1978; an amended complaint—on which the case has proceeded—

[1] "R." refers to the Record in the District Court, which became part of the record in the Court of Appeals; the first number following "R." is the item designation.

was filed on March 20, 1978. Because this petition does not address the merits of plaintiffs' several claims of illegality, these allegations of their complaint need only be summarized:

1) Section 1.16 of the amended Plan improperly altered the "normal retirement age" from 57 to 65.[2]

2) Section 3.10 of the amended Plan did not properly compute benefits accrued for services prior to February 1, 1976.[3]

3) Section 4.04 of the amended Plan does not properly credit part-time services.

4) Section 3.08 of the amended Plan sets out a deficient schedule for awarding of early retirement benefits.

5) Section 3.09 of the amended Plan improperly reduced vested retirement benefits.

Plaintiffs did not allege that either of them was or might be injured by any of the provisions of the amended Plan which they challenged; nor did either allege that he had made an application for or been denied any benefits under the Plan. The only allegations which even bear on plaintiffs' right to bring this suit are that both are participants in the Plan and had been participants for more than twenty years (Amended Complaint, Par. 4).

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[2] On the basis of this alleged violation plaintiffs contended that they were deprived of

(a) The right to have actuarial reductions based upon age 67 rather than age 65 for benefits commencing prior to age 57;

(b) The right to have benefits commence at age 57 rather than at age 65; and

(c) The right to pre-retirement survivor benefits between ages 47 and 57 rather than between ages 55 and 65. Plaintiffs renew the contention that the "normal retirement age" under the amended Plan is illegal in their petition for certiorari, No. 82-37, *William R. Janowski et al. v. International Brotherhood of Teamsters Local No. 710 Pension Fund et al.*

[3] This issue is also tendered by plaintiffs in No. 82-37.

In opposing class certification defendants urged, *inter alia*, that plaintiffs lacked standing to challenge the amendment and that their claims were not ripe. Defendants pointed out specifically that the plaintiffs had shown no injury, present or prospective, from the part-time service credit provision, § 4.04. (Defendants' Memorandum in Opposition to Class Certification, pp. 3, 5-7).

In its Decision on Class Action, the District Court rejected defendants' justiciability objections. The court did not find that plaintiffs had alleged or shown any injury, present or prospective, with respect to any of the claims. Rather, the court said only that they were given the right to sue by § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), quoted at p. 2, *supra*.

The court certified a class under F.R.C.P. Rule 23(b)(2) as follows:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intend to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976. [App. 28a] [4]

B. The District Court's Decision On The Cross-Motions For Summary Judgment

Plaintiffs and defendants moved for summary judgment on the merits. Defendants renewed their submission that neither of the plaintiffs presented a justiciable claim because of lack of standing and ripeness. It was

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[4] The court modified plaintiffs' more ambitious request:

> All persons who are now, or who were as of February 1, 1976, members of Local No. 710 of the International Brotherhood of Teamsters and who have accrued benefits subject to the terms of the Pension Plan of said local as amended effective February 1, 1976. [App. 25a]

again specifically urged that neither of the plaintiffs had been affected by the application of the past-service credit rule in § 4.04 of the Plan (Memorandum in Support of Defendants' Motion For Summary Judgment, p. 6).[5]

In ruling on the motions for summary judgment the District Court "reject[ed] preliminary challenges to plaintiffs' right to bring this action"; the court again cited only 29 U.S.C. § 1132(a)(3) (App. 29a). On the merits the District Court ruled in the defendants' favor with respect to the "normal retirement age" claim (App. 30a-31a) and in plaintiffs' favor on each of the other claims (App. 32a-35a). The court subsequently entered an order incorporating its rulings (App. 37a-39a).

C. The District Court's Decision On Attorneys' Fees

The District Court issued a separate decision awarding attorneys' fees to plaintiffs. It determined that such fees are authorized by § 502(g) of ERISA, reproduced at p. 2, *supra*, and that plaintiffs were entitled to attorneys' fees although they "were only partially successful," because "this is a matter to be considered in measuring the amount, not the entitlement" (App. 41a). However, in determining the amount, the court allowed plaintiffs' attorneys to recover for all hours spent on the case, deducting nothing for the time spent in litigating the "normal retirement age" issue (App. 42a). The court, taking into account both inflation and a contingency factor, found that the hourly rate ($100.00 per hour) which plaintiffs' lead counsel sought was reasonable, although this attorney had previously charged for his time at lower rates (42a-43a). The court then turned to the question of whether it should award a multiplier for the fee at the foregoing hourly

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[5] Defendants also called the court's attention to the then recent decision in *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782-785 (C.A. 9) described at p. 12, n.10, *infra*. (Memorandum in Support of Defendants' Motion For Summary Judgment, p. 7, n.11).

rate and if so what the multiplier would be, Mr. Grasso (plaintiffs' lead counsel) having sought a multiplier of 3 and two of his partners a multiplier of 2. In deciding that a multiplier should be used the court took into account two factors: "the contingency of prevailing in representation" and "the financial results obtained". In the latter connection the court determined that under its ruling regarding the computation for accrued benefits, § 3.10, the affected retirees would receive "benefits averaging from $48,960 to $58,140, with a total estimated by the court of almost $7½ million (App. 44a). The court also stated its belief that other benefits it had awarded "will be substantial" (*id.*). The court therefore concluded that a multiplier of 2 should be awarded. In rejecting a higher multiplier it relied on three considerations: 1) The plaintiffs were not wholly successful; 2) their attorneys' fees must be paid out of the pension fund itself; and 3) a multiplier higher than 2 is ordinarily used where the defendants have been guilty of some knowing or at least notorious violation of the law (App. 45a).

The result was that the plaintiffs' attorneys were awarded fees at *twice* their hourly rate for *all* time spent in the litigation. Defendants had urged that in calculating the fee the court should take into account the fact that "whatever fees are paid must come out of the finite amount of the pension fund". The District Court took a contrary view:

> If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorney fees for fiscal year ending January 31, 1980, com-

> pared to which the fees for plaintiffs' attorneys would be a relatively small burden. [App. 45a].[6]

The total fee awarded was $142,485.000 (App. 49a).

D. The Decision of The Court of Appeals

Both sides appealed. The Court of Appeals ruled, in presently pertinent part, as follows:

1) The defendants' contention that the District Court was without subject matter jurisdiction for lack of standing and ripeness was rejected (App. 3a, 5a, discussed at pp. 12-13, *infra*).

2) The Court of Appeals affirmed the dismissal of plaintiffs' "normal retirement age" claim (App. 6a-10a). On defendants' appeal, the Court of Appeals reversed three of the four determinations of liability which had been made by the District Court. The only finding of a violation which was sustained was the District Court's view that § 4.04 of the Amended Plan does not provide a "sufficiently ratable" allocation for part-time service to satisfy 26 U.S.C. § 411(b)(3)(B) and its implementing regulation.

3) The District Court's award of attorneys' fees was affirmed in full. The Court of Appeals agreed that plaintiffs were entitled to an award under § 502(g) of ERISA (a point which we do not here contest). And despite its disapproval of all but one of the illegality findings, the appellate court "adopt[ed] the district courts' analysis and conclusion with respect to the amount awarded" (App. 18a). The Court of Appeals' discussion in affirming the total fee award is set forth in full at p. 18, n.18, *infra*.

In a partial dissent, Judge Fairchild declared, *inter alia*, that the attorneys' fees award was too high because

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[6] The court also determined that this was not an appropriate case for requiring the plaintiffs to exhaust their remedies under the procedures provided by the pension plan (App. 3a-5a). We do not pursue this point here.

of the appellate court's liability conclusions. (App. 20a, quoted at p. 19 *infra.*)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS THAT PLAINTIFFS HAVE STANDING TO CHALLENGE THE PART-TIME SERVICE CREDIT PROVISION OF THE PLAN IS CLEARLY INCONSISTENT WITH THE ARTICLE III DECISIONS OF THIS COURT CULMINATING IN *BLUM v. YARETSKY* AND RAISES AN IMPORTANT AND RECURRING ISSUE UNDER ERISA.

A. The courts below did not find, and there is nothing in the record showing that either plaintiff would be affected in any way by a determination that the part-time service credit provisions of the Plan do not comply with ERISA. Like Kiltartan's poor, "No likely end would bring them loss or leave them happier than before."[7] Under these circumstances, the courts below lacked subject matter jurisdiction over the claim that this provision violates ERISA.

Blum v. Yaretsky (hereafter *Yaretsky*), —— U.S. ——, 50 L.W. 4859 (decided June 25, 1982) declared the governing principle:

> It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). It is not enough that the conduct of which the plaintiff complains will injure *someone.* The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the neces-

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[7] W. B. Yeats, "An Irish Airman Foresees His Death".

> sary stake in litigating conduct of another kind, although similar, to which he has not been subject. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972). [50 L.W. at 4861, slip op., p. 7, emphasis in original.]

Applying these principles this Court concluded that the respondents, who were medicare patients in a skilled nursing facility had standing to challenge the procedures for facility-initiated discharges and transfers to lower levels of care, because the possibility that the nursing homes in which they resided would make such a determination was "not 'imaginary or speculative'". 50 L.W. at 4861, sl. op. 8, quoting *Younger v. Harris*, 401 U.S. 37, 42. But the respondents in *Yaretsky* were held to lack standing to challenge the procedures governing transfers to *higher* levels of care:

> We cannot conclude, however, that the threat of transfers to *higher* levels of care, whether initiated by the URC's, the nursing homes, or attending physicians, is "of sufficient immediacy and reality," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), that respondents have standing to seek an adjudication of the procedures attending such transfers. Nothing in the record available to this Court suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers. It is not inconceivable that respondents will one day confront this eventuality, but assessing the possibility now would "tak[e] us into the areas of speculation and conjecture." *O'Shea v. Littleton*, *supra*, at 497. [50 L.W. at 4861, slip op. pp. 8-9, emphasis in original]

Neither of the plaintiffs here has shown that he himself has been denied any credits for part-time services under § 4.04 of the amended Plan; nor has either asserted (let alone established) that there is any likelihood that he will perform part-time services in the future and that his pension eligibility or benefits will be affected by

this provision. Moreover, neither of the plaintiffs has applied for (let alone been denied) any benefits under the Plan. It is therefore clear that their interest in the Plan's part-time service credit formula lacks "sufficient immediacy and reality" to satisfy the requirements under Article III, as elaborated in *Yaretsky*.

Yaretsky is directly on point in two additional respects:

Even as *Yaretsky* denied standing to the plaintiffs with respect to the procedures regarding transfers to higher-levels of care although granting standing with respect to discharges and transfers to lower levels of care, so the present plaintiffs do not have standing to raise the part-time service credit issue even though they may arguably have standing to challenge other provisions of the Local No. 710 Plan. 50 L.W. at 4861, 4862, sl. op. 8, 10. Moreover, it would avail plaintiffs nothing to argue that other members they represent are affected by the challenged part-time service credit policy. *Yaretsky*, 50 L.W. at 4861, n.13; *General Telephone Co. of Southwest v. Falcon*, —— U.S. —— 50 L.W. 4638 (decided June 14, 1982).[8]

B. The standing principle declared and followed in *Yaretsky* is not novel. See, in addition to the cases cited therein, *e.g.*, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216, 220-221; *Warth v. Seldin*, 422 U.S. 490, 498-499; *Valley Forge v. Americans United*, —— U.S. —— 50 L.W. 4102, 4105-4106, sl. op. pp. 6-9 (decided January 12, 1982). Moreover, as the Court noted in *Warth*, the "standing question * * * bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial inter-

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[8] Actually, there is no showing that *any* member of the class would be adversely affected, because the class was defined in terms of plaintiffs' entirely distinct claim that the Plan's early retirement provisions are illegal. See p. 5, *supra*.

vention—and of mootness * * *". 422 U.S. at 499, n.10, citing, as to ripeness, *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498.[9] And consistent with this Court's teachings, in applying the ripeness element of justiciability the lower courts have previously held that a pension plan participant does not raise a controversy which the federal courts have power to entertain unless he can show a present or imminently threatened injury.[10]

C. In rejecting defendants' objection that the District Court lacked subject matter jurisdiction, the Court of Appeals did not discuss any of this Court's decisions, or even mention Article III of the Constitution. The Court placed exclusive reliance on § 502(a)(1) of ERISA which "provides that a civil action may be brought 'by a participant . . . to clarify his rights to future benefits under the Plan . . .'" In the Court's view, "this action is pre-

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[9] *O'Shea v. Littleton*, 414 U.S. 488, which was cited in *Yaretsky*, (see p. 10, *supra*) also illustrates the close relationship between standing and ripeness in determining whether plaintiffs "satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." (414 U.S. at 493; see *id.* at 493-499).

[10] In *Lugo v. Employees' Retirement Fund*, 529 F.2d 251 (C.A. 2) the court, following *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, and *Lake Carriers' Assn.*, *supra*, concluded:

> The possibility, or even, if such it is, the certainty that the Fund will invoke the 90/10 rule that Lugo claims is illegal to deny his application for a retirement pension at age 60 causes him no injury now, nor is he imminently threatened with such injury. The interest he asks us to defend has little "immediacy and reality." [529 F.2d at 257-258].

The decision in *Lugo* was approved in *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782-784 (C.A. 9). The Ninth Circuit undertook a thorough discussion of the justiciability requirements of Article III of the Constitution and dismissed a participant's challenge of the trustees' interpretation of the plan because "he has neither averred nor shown that he intends to retire and apply for retirement benefits until some unspecified time in the future." (*Id.* at 784).

cisely the type of action contemplated by the statute." (App. 5a). But even if this interpretation of the statute is correct,[11] the failure to consider constitutional limitations was fundamental error. *Warth v. Seldin*, *supra*, makes this clear: "* * * Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." (422 U.S. at 501).

Adherence to established standards of justiciability is of special importance in determining whether a court may entertain suit under ERISA. There are, throughout the United States, many tens of thousands of covered private pension plans. Most, if not all of these plans have one or more provisions concerning which, on their face, or in application to individual situations, a question of compliance with the complicated terms of ERISA can be raised. The legal mind, particularly when inspired by the lure of a generous fee award, can readily conjure up a series of abstract claims of illegality; the multifaceted complaint herein evidences that this concern is not chimerical. Thus, the view of the Court of Appeals, which allows pension plan participants to bring suit to challenge plan provisions without showing that they will be affected thereby at the time of suit as the lower courts

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[11] We do not concede that either § 502(a)(1)(B) of ERISA, or § 502(a)(3) (which was relied on by the District Court, but not by the Court of Appeals) authorizes pension plan participants to sue to invalidate plan provisions which do not affect them. In construing a general grant of jurisdiction the courts should not lightly attribute to Congress the intent to ignore accepted principles of justiciability. Cf., *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 692-693; *Machinists v. Street*, 367 U.S. 740, 749-750. However, while we reserve this underlying statutory issue, we do not argue it herein, because the decision below is so clearly contrary to Constitutional restrictions on federal jurisdiction. Cf. *Yaretsky*, *supra*, where the Court deemed it unnecessary even to identify the jurisdictional statute which the plaintiffs had invoked in bringing suit.

have previously required, or even at some time thereafter, bids fair to flood the federal courts with pension litigation.

II. THE COURT OF APPEALS' AFFIRMANCE OF THE ATTORNEYS' FEE AWARD RAISES AN ISSUE WHICH THIS COURT HAS ALREADY AGREED TO DECIDE AND ADDITIONAL ISSUES WARRANTING THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

A. This Court Has In Two Cases Agreed To Decide Whether a Plaintiff May Be Awarded Attorneys' Fees For Time Spent in Litigating Claims On Which the Defendant Prevailed.

The District Court awarded attorneys' fees to plaintiffs for all the time spent in litigating the present suit although it rejected their claim that the definition of "normal retirement age" in § 1.16 of the amended Plan is illegal (p. 6, *supra*). The Court of Appeals affirmed the total award although it decided against plaintiffs with respect to the § 1.16 claim and three others (p. 8, *supra*). Consequently, plaintiffs' attorneys are being rewarded for services performed in prosecuting five separate claims, although they prevailed on only one, and the defendants are being required to pay the fees for all the time spent by the attorneys on both sides in this litigation, although four of those five claims were determined in defendants' favor.

The propriety of calculating the award thus generously is a question which has divided the Court of Appeals. The First, Third, Fifth, Ninth, Tenth and District of Columbia Circuits have held that counsel should not be compensated for time spent on losing claims.[12] The Sixth

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[12] See, *e.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (C.A. 1); *Hughes v. Repko*, 578 F.2d 483, 487 (C.A. 3); *Jones v. Diamond*, 636 F.2d 1364, 1382 (C.A. 5 en banc), cert. den., 453 U.S. 950; *Bartholomew v. Watson*, 665 F.2d 910, 914 (C.A. 9); *Gurule v. Wilson*, 635 F.2d 782, 794 (C.A. 10, on rehearing); *Copeland v. Marshall*, 641 F.2d 880, 891-892, text and note at n.18 (C.A. D.C. en banc).

and Eighth Circuits like the Seventh in this case, have approved fees for all hours spent.[13] The Court has agreed to resolve the conflict in two pending cases: *Hensley v. Eckerhart*, No. 81-1244, cert. granted, 50 L.W. 3695 (March 1, 1982) and *Ashcroft v. Planned Parenthood Assn. of Kansas City, Missouri, Inc.*, No. 81-162, cert. granted, 50 L.W. 3934 (May 24, 1982). We therefore consider it to be unnecessary to demonstrate further that review of this issue is appropriate. Given the pendency of those cases our comments on the merits of the issue will be brief.

We believe that a succinct statement of the correct test was set forth by Judge McGowan for the District of Columbia Circuit, sitting en banc in *Copeland v. Marshall*, 641 F.2d 880:

> • • • no compensation should be paid for time spent litigating claims upon which the party seeking the fee should not ultimately prevail.[18]

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[18] *E.g., Oldham v. Ehrlich*, 617 F.2d 163, at 168 n.9 (8th Cir. 1980); *Dillon v. AFBIC Devel. Corp.*, 597 F.2d 556, 564 (5th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). However, it sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted "are truly fractionable," *id.*

[641 F.2d at 891-892, reaffirmed in *Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1327, text and note at n.13].

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[13] See, *e.g., Northcross v. Board of Ed., Memphis City Schools*, 611 F.2d 624, 636 (C.A. 6), cert. den., 447 U.S. 911; *Planned Parenthood v. Ashcroft*, 655 F.2d 848, 872 (C.A. 8), cert. granted, 50 L.W. 3934 (May 24, 1982). The Seventh Circuit had previously reached a different result from that herein, see *Muscare v. Quinn*, 614 F.2d 577, 580-581 (C.A. 7).

Under the foregoing approach a plaintiff is treated as the prevailing party, and therefore may be awarded fees even if he is successful on only one claim. Moreover, he may be credited for time spent in pursuing alternative theories in support of that claim, although only one theory persuaded the court, and in pursuing alternative remedies for the same violation. On the other hand, plaintiffs will not be encouraged by the hope of enlarging the fee award to add unmeritorious claims,[14] and parties which successfully defend against claims will be protected against the unfairness of having to pay for time spent by their adversary, as well as for that of their own counsel. The contrary rule followed below is too radical a departure from the American rule to have been authorized by Congress [15] or to be imposed by the courts

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[14] *See, Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 Col. L. Rev. 346 (hereafter Columbia Note):

> At one end of the spectrum, the court can reimburse a "prevailing plaintiff" for all of the expenses incurred by counsel. This is the method usually used when the plaintiff prevails on all his claims. This system is fair to the winning attorney and is consistent with the literal language of the statute; however, it can lead to unfair results when a plaintiff who has succeeded on less than all the issues demands attorney fees. If all his costs are refunded, the court is in effect rewarding the joinder of meritless claims. This encourages plaintiffs to plead frivolously and burdens the court with extra litigation. To discourage such pleading, the court should count only those hours spent on claims that succeeded. [*Id.* at 376.]

[15] It should be noted that *Hensley* and *Ashcroft*, in contrast to this case, involve the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. And respondents in *Hensley* rely heavily on the legislative history of that Act. (Brief for Respondents, No. 81-1244, pp. 32-45). But that history does not purport to declare standards for actions not involving the strong public policy favoring the vindication of civil rights. Even if the *Hensley* respondents' view of 1976 Act's legislative history is correct, it is entirely consistent with our position here. For the District Court decisions which, in their view were approved by Congress, decided, as they observe

where Congress has not spoken. In this connection, the views of the House of Lords, although of course not authoritative, are instructive:

> If the proviso to Order LV. were read as providing that the costs were to follow the event in the sense of giving the costs of all the issues to the party who had recovered something in the action while he had failed upon most of the issues, it would have introduced a startling novelty while its object was to keep up the old practice as to costs. Such an alteration would, moreover, in its working have been inequitable, and it cannot be supposed that, without any reason for it, an innovation of this kind was contemplated by those who framed it or by the Legislature which sanctioned the order. It is not to the purpose to argue that the injustice which would arise under the order so construed might be corrected by the exercise of the special power to order otherwise for good cause conferred upon the judge of the Court. [*Reid, Hewitt & Company v. Joseph*, [1918] A.C. 717, 725).] [16]

(*id.* at 35), that "Legal services for a prevailing party were reasonably expended unless * * * they were spent on claims so wholly unrelated, causes of action so clearly separable, or issues so distinguishable and discrete that, looking at the case as a whole, the time involved in preparing, proving, or litigating them had in no way contributed to the 'ultimate result achieved,' *Davis v. County of Los Angeles, supra*, 8 E.P.D. [¶ 9444] at 5049; *Stanford Daily v. Zurcher, supra*, 64 F.R.D. [680] at 684."

[16] Also revealing is the Columbia Note's description of "the European concept of 'legal necessity' ":

> Under that procedure, the test for compensation is whether a given step was necessary to obtain the relief afforded: if the maneuver was required by the adjudicatory process, then the hours spent handling that step are fully compensable, but if it was irrelevant to the ultimate judgment, the party must pay for it himself. In deciding what steps—and even what pleadings—were necessary, a court using this test must reimburse the claimant for hours spent on all activities that reasonably helped him on the claims he won. Time spent on irrelevant claims would not be compensated because joinder of meritless

B. In Affirming The District Court's Award Of Attorneys' Fees The Court Of Appeals Committed Three Additional Errors Which Should Be Corrected In The Exercise Of This Court's Supervisory Powers.

"[I]t is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorney fees." [17] In affirming the award in this case the court below defaulted on that duty in three respects apart from the apportionment issue just discussed. Because of their cumulative effect herein and their broad applicability under statutes which authorize the federal courts to make fee awards these errors should be reviewed and corrected in the exercise of this Court's supervisory powers.

1. In passing on the amount of the attorneys' fee award the Court of Appeals "adopt[ed] the district court's analysis and conclusion with respect to the amount awarded * * *" (App. 18a).[18] This course was error even

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pleadings would not be deemed helpful in obtaining the final judgment. Even if the standard were interpreted liberally, court congestion could be further controlled by allowing defendants fees when plaintiffs litigate frivolous issues and through use of the common law and statutory bad faith exceptions. [80 Col. L. Rev. at 376-377, footnotes omitted.]

[17] *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (C.A. 2) quoting with approval *Twentieth-Century Fox Film Corp. v. Brookside Theater Corp.*, 194 F.2d 846, 859 (C.A. 8).

[18] The Court of Appeals' discussion of this issue reads in full as follows:

> Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it. Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded. [App. 18a]

if it be assumed (contrary to our submission) that the District Court's analysis was, as the court of appeals believed, correct. For, that analysis was based on the view that four of the five rules which the plaintiffs had attacked were illegal, a premise which was rejected on appeal. In consequence, *neither the District Court nor the Court of Appeals has ever made an independent* de novo *determination of the appropriate amount of the fee based on plaintiffs' actual accomplishments in this litigation.* The Court of Appeals nevertheless declared:

> Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded. [App. 18a]

Judge Fairchild disagreed with this portion of the decision, observing that the "implied accrual formula, dealt with in Part III of this court's opinion, appears to be the most significant victory of the class members before the district court, and we are reversing that part of the decision." (App. 20a). The District Court's opinion confirms that the benefit to the class resulting from the liability holding on this issue weighed heavily in the decision to utilize a multiplier of 2, see App. 44a, quoted at p. 7, *supra*. Thus, the Court of Appeals was simply wrong when it assumed that the District Court's award would have been the same if the trial judge had not erroneously held in plaintiffs' favor on the "implied accrual" and two other liability issues.

Moreover, the Court of Appeals made a fundamental error by taking it on itself to determine the amount of the award although it had in large part reversed the District Court on the merits. Because such calculations have long been regarded as being discretionary with the district court in the first instance [19] (subject of course to "sound legal principles" (cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, quoting *United States v. Burr*,

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[19] *Trustees v. Greenough*, 105 U.S. 527, 537.

25 F. Cas. 30, 35 (CC Va. 1807)) the Court of Appeals should have remanded the case to the District Court for recalculation of the fee.

Under parallel circumstances, this Court recently held:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings * * *
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332. All of this is elementary. [*Pullman-Standard Co. v. Swint*, —— U.S. ——, 50 L.W. 4425, 4430, (decided April 27, 1982).]

So, too, where the district court has made a discretionary determination which is its responsibility in the first instance, and that determination is infirm because of a legally erroneous view of liability, "a remand is the proper course unless the record permits only one resolution of the [discretionary issue]". This point was ably articulated in *Oser v. Wilcox*, 338 F.2d 886, 893 (C.A. 9);[20] the court's reference therein to Justice Frankfurter's discussion in the first *Chenery* case is particularly apposite since in a context like the present the appellate court is exercising a function more closely akin to its

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[20] The *Oser* Court said:

> Since the district court has not, in the exercise of its discretion, determined that there is a probability that there is no reasonable possibility that plaintiff can prevail on the merits the order requiring security for costs cannot rest on that ground. Where an exercise of discretion properly goes into a trial court determination of whether to grant or deny particular relief, the grounds upon which the order is based are those upon which it must be judged. Cf., S.E.C. v. Chenery Corp., 318 U.S. 80, 88, 93-94. [338 F.2d at 893, footnote omit ed.]

review of discretionary determinations of an administrative agency than of rulings of law of a lower court.

2. If the Court of Appeals had remanded the case to the District Court for reconsideration of the fee award that court would in all likelihood have reduced or eliminated the multiplier in reevaluating the fee. Nor should the Court of Apepals have appointed the multiplier portion of the District Court's analysis even on that court's erroneous liability premise. This, too, raises an issue warranting this Court's consideration, because the use of multipliers is inherently arbitrary and though approved by several courts, has been firmly disapproved by one Court of Appeals. In *Oliver v. Kalamazoo Bd. of Ed.*, 576 F.2d 714 (C.A. 6) the court found "that the district court abused its discretion in employing the multiplier [of two] to increase the attorneys' fee award," because it "was without statutory authority."[21] The *Oliver* Court added:

> Attorneys' fees awards should be high enough to attract competent counsel yet not so high as to provide a windfall for them. Multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve this goal. [*Id.* at 715-716][22]

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[21] The applicable statute in *Oliver*, 20 U.S.C. § 617, provides for the recovery of "a reasonable attorney's fee"; the court observed that the same language is found in 42 U.S.C. § 1988. (576 F.2d at 715, n. 5). It is used also in § 502(g) of ERISA.

[22] In the present case, the multiplier was justified by the District Court on the basis of the result achieved (which was substantially diminished by the Court of Appeals) and by the contingency factor. See p. 7, *supra*. The latter factor was also taken into account in calculating the attorneys' fees on the basis of counsel's rates at the time of the award, rather than at the time that the services were performed (and would have been paid for in the absence of a contingency arrangement). (See pp. 6-7, *supra*.) This seems to us to be a reasonable accommodation. But to increase the defendants' liability because the plaintiff and his attorney have a contingency arrangement is unfair to the defendant (particularly in the absence of willful wrongdoing) and paradoxical. See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (C.A. 3).

3. Finally, we submit that the Court of Appeals should have firmly disapproved the District Court's analysis insofar as that court gave any weight to the size of the pension fund's assets of $222,500,000, and their increase of more than $27,000,000 in the prior fiscal year (App. 45a). Even if relevant in determining the amount of the fee to be awarded this description would be grossly misleading, for it disregards the actuarial liabilities of the fund. But of course, the size of a pension fund's assets should be held irrelevant in determining the amount of its liability for attorneys' fees.[24] In § 2(a) of ERISA, 29 U.S.C. § 1001(a), Congress found, *inter alia*, "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered" (See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-375.) The Congressional policy promoting the solvency of plans can only be undermined if such plans are penalized for their responsibility and soundness by increasing their vulnerability to large fee awards, and inevitably to speculative litigation.

Lastly, there is an overriding objection to imposing a heavy attorneys' fee award on a defendant because it "would be a relatively small burden" compared to the defendants' assets or unrelated legal expenses (App. 45a). As was said in an analogous context in *Copeland v. Marshall, supra:*

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[24] Some courts regard the fees spent by the defendants to be a useful guide in evaluating the reasonableness of the award to the plaintiffs. But no such application of Newton's third law of motion can justify the District Court's adversion to the fact that "the fund itself paid $1,158,861 in attorney fees for fiscal year ending January 31, 1980" (App. 45a). For plaintiffs themselves, in submitting these figures to the District Court, observed that the major portion thereof was for services in a major sale of real estate, and of course there is a substantial and continuous need for attorneys' services in the administration of a pension fund.

> In sum, we agree with the panel opinions that the government has a "deep pocket" and that any fee request should be examined with care. But we think, for the reasons stated above, that fees should be neither lower, nor calculated differently, when the losing defendant is the government. [641 F.2d at 896 (C.A. D.C. en banc)]

The same equitable principle should govern in suits against private parties. In calculating fee awards the courts should not be in the business of redistributing wealth. Once it is determined that the party to be charged with fees is capable paying them without undue hardship, the amount of the obligation should not be increased over what is reasonable because that party is able to afford more.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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